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No. 920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

ALVA G. BLANCHARD,

Petitioner

vs.

CITY OF SHREVEPORT

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

ALVA G. BLANCHARD
In propria persona
For Petitioner

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ALVA G. BLANCHARD,

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vs.

CITY OF SHREVEPORT,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Alva G. Blanchard, your petitioner prays that a Writ of Certiorari issue to review the judgment refusing to issue a Writ of Certiorari or Review of the Court of Appeal, Second Circuit, State of Louisiana, said writ having been denied on January 21, 1957. (Appendix, Page A-6, Record, page 121).

OPINIONS BELOW

The Louisiana Supreme Court refused to issue a Writ of Certiorari or review to the Court of Appeal, Second Circuit, State of Louisiana, and affirmed the action of the Second Circuit Court of Appeal in dismissing the action upon motion of respondent. (Appendix, Page A-6, Record, Page 121).

JURISDICTION

The judgment of the Louisiana Supreme Court refusing to grant a Writ of Certiorari or review was issued January 21, 1957. (Appendix, Page A-6, Record, Page 121). The jurisdiction of this court is invoked under the provisions of 28 U. S. C. A., § 1257 (3). (Appendix, Page A-9).

QUESTIONS PRESENTED

1. Can the courts of a State ignore statutory and codal law which is designed to protect the property of an individual citizen, thereby depriving him of due process and equal protection of the law as guaranteed under the Fourteenth Amendment of the U. S. Constitution?

2. Where the law of injunction as set forth in the Louisiana Code of Practice is as follows:

> "296. Injunction, or prohibition, is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims.

Article 296, Louisiana Code of Practice. (Appendix, Page A-7).

"298. The injunction must be granted, and directed against the defendant himself, in the following cases:

(5) When the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year, either of a real estate or of a real right, of which he claims either the ownership, the possession, or the enjoyment."

Article 298, Louisiana Code of Practice. (Appendix, Page A-7).

and respondent deliberately violates real rights protecting petitioner, can a District Judge of the State of Louisiana deprive petitioner of his property without due process or equal protection of the law by refusing injunctive relief, thereby sanctioning the damages done petitioner by respondent, and then refuse to order the damages repaired?

3. Can a municipality, through its engineering department, ignore existing statutory and codal law enacted to protect the property of its citizens and formulate and force on the public a plan which damages one citizen and deprives him of his property without due process or equal protection of the law where said damage could have been avoided at no additional cost to the municipality and the plan as executed worked no benefit to the citizens as a whole?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, Pages A-7 through A-9.

STATEMENT

This action was originally brought in injunction in the First Judicial District Court, Caddo Parish, Louisiana, in an effort to enjoin the City of Shreveport from destroying certain improvements and drainage facilities at the rear of petitioner's property at 3613 Fairfield Avenue, Shreveport, Louisiana. (Record, Pages 1-4, and Exhibits A, and B-1 through B-8).

When petitioner first acquired the premises at 3618 Fairfield Avenue, Shreveport, Louisiana, in 1943, one of the primary considerations was the small, deep stream which runs along the rear boundary of the property. (Exhibits A, B-5 and B-6).

After acquiring the property, petitioner began a long range series of improvements, beginning with the rocking of the stream banks, and culminating eventually with the construction of an irrigation system, (Exhibits A, B-5, and B-6), a large swimming pool, patio area, and barbecue pit. (Exhibit B-1).

Ever since petitioner has been personally acquainted with the behavior of the stream in question (Exhibits B-5 and B-6), it has carried at least 100,000 gallons of clear, fresh water past his property year in and year out,

even in the driest of weather. The running water afforded an opportunity to save money by using some of this water for irrigation purposes. The scouring action of the water over the years had eroded the banks of the stream so that one bank and part of the bed of said stream was on petitioner's property at the time of purchase.

Since the stream bed was technically on land owned by the Daughters of the Cross, a local Roman Catholic religious order, petitioner decided to talk the contemplated improvements over with the Mother Superior of that order to see whether there was any objection to petitioner's plan to rock the banks of the stream and fill in the eroded areas along his rear property line. The filling which petitioner contemplated would return the stream to its old bed.

Since it was obvious to the Mother Superior that the proposed improvements would benefit all concerned, she gave her permission for petitioner to rock and improve as much of the stream as he wished. For obvious reasons, petitioner saw no reason for reducing this agreement to writing, nor for trying to get title to the stream bed.

After permission was granted, petitioner installed an irrigation system in the stream bed, (Exhibits A, B-5 and B-6), and to prevent further erosion, rocked the bank of the stream on the side bounding his property (Exhibits B-2, B-3 and B-4). Part of the irrigation system consisted of two small waterfalls in the bed of the stream

(Exhibits B-5 and B-6), which substantially increased the natural beauty of the stream as well as effectively operating the irrigation system. These waterfalls did not in any way ever cause flooding above petitioner's property or impede the natural flow of water in the stream. The water passing over the waterfalls was impounded by hydraulic rams which petitioner installed in the bed of the stream to pump water into his yard. This water was used for irrigation, and created a substantial savings on water bills over the years. The rock retaining wall, which was built along the stream bank, ran from the stream bed to the top of the bank, a height of about eight feet, and meandered along the east bank of said stream behind petitioner's property for a distance of approximately 175 feet. (Exhibits A, B-2, and B-6).

Petitioner further beautified the area by adding a low rock wall along the top of the bank, a stone patio area, and a stone barbecue pit, all surrounding a rock walled swimming pool, approximately eight feet deep, thirty-eight feet long, and twenty feet wide. (Exhibits B-1 through B-8).

The swimming pool has an eight inch drain running from the center of the bottom of the pool, under the pool and through the rock wall, which formerly entered the stream at its normal low water level (Exhibit B-7). The pool was always drained by gravity, and never has had a pump to empty it. Petitioner always used fresh city water instead of a filter system, so the drain is absolutely essential to the normal use and enjoyment of the

pool. All of the above described improvements were made by petitioner more than ten years before December 7, 1955. (Record, Page 1).

By letter dated December 7, 1955, petitioner was advised by the Department of Public Works, City of Shreveport, that the stream was going to be paved. Petitioner was advised that in this connection, it would be necessary:

> "to remove some of these improvements, such as the existing dam and part of the masonry wall, and, as the bottom of proposed ditch will be approximately two feet higher than the existing ditch, several of the outlet drains from your property will be below the paved grade." *Letter from City of Shreveport*, dated December 7, 1955.

Petitioner felt that the City's plan to raise the grade of the stream was not justified historically, since even in its natural state, there was never any flooding above or below petitioner's property. He accordingly consulted independent engineers to determine whether the City's plan was necessary in order to achieve effective or adequate drainage. (Record, Pages 1 through 4, Appendix, Pages A-10, A-11, and A-12).

Engineers advised petitioner that the City's plan to cover his rock wall, destroy his irrigation system and raise the grade of the stream to a level approximately two feet above his swimming pool drain, was not necessary to achieve adequate drainage. (Appendix, Pages A-10, A-11, and A-12, and Record, Pages 1 through 4). Based on

this information, petitioner requested the City to alter its plan so that petitioner's improvements could be saved. At the time he requested the City to change its plan, petitioner offered to pave, at his own expense, and at a saving to the City of approximately $3,000.00, that portion of the stream bordering his property. (Appendix, Pages A-10, A-11 and A-12). The City refused to alter its plan and refused to accept petitioner's offer.

In an effort to show the City that the destruction of his irrigation system and drainage facilities was not necessary, petitioner met with the City and had the engineers who had been consulted by him explain why the stream bed did not need to be raised or altered from its existing course to secure adequate drainage. (Record, page 2, Paragraph 5). The engineers demonstrated that satisfactory alternates could be employed which would provide adequate drainage and retain petitioner's improvements. (Appendix, Pages A-10, A-11, and A-12, Record, Page 2, Paragraph 5). The City insisted that the stream bed had to be raised so that the discharge capacity of the ditch could be increased. When petitioner's engineers demonstrated that an increased discharge capacity could be attained by simply widening the ditch, the City contended that widening a ditch does not increase its capacity. The error of such a statement is patent. It is elementary that a four-inch pipe carries more water than a two-inch pipe, just as the Mississippi River carries more water than a small creek.

This cause of action was filed in the First Judicial Court, Caddo Parish, Louisiana, on the fourteenth day of April, 1956. (Record, Page 5). The petition requested a permanent injunction, since there was ample time for the case to be heard on its merits before that term of court ended. (Record, Pages 1 through 5). On August 1, 1956, the case had still not been heard, having been postponed while a compromise was discussed. Since the threatened damage was then immediate, a preliminary injunction was requested in an amended petition. (Record, Pages 8 and 9). The request for injunction was set on a rule to show cause (Record, Pages 9 and 10) why an injunction should not issue restraining the City from going ahead with its proposed damage to petitioner. At the trial of the rule, an exception of no cause or right of action was filed by the City and was sustained by the District Court, the judge ruling that a city could not be enjoined from doing the contemplated damage to petitioner. (Record, Page 17). The judgment refusing the preliminary injunction was appealed and the record filed in the Louisiana Court of Appeals, Second Circuit. (Record, Page 18).

Prior to the hearing before the Court of Appeals, a motion to dismiss was filed by the City, accompanied by supporting affidavits to the effect that the contemplated paving of the stream was already completed. (Record, Pages 19 through 22). Petitioner pointed out that he was guaranteed protection by the Louisiana Civil Code and the Louisiana Revised Statutes, and that the fact that the stream was paved did not alter his rights to irrigation and drainage. So long as the City blocks the

drains and irrigation facilities belonging to petitioner, there is a continuous violation of Article 661 of the Louisiana Civil Code of 1870 and § 215 of Title 38 of the Louisiana Revised Statutes of 1950. (Appendix, Pages A-7 and A-8).

The Court of Appeals dismissed the appeal without a hearing and stated:

> "We are left with no other alternative than to dismiss the appeal as there can be no doubt that the acts of defendants which plaintiff would prevent by this appeal, have been fully performed.
>
> "It is well settled that in cases where no practical results can be obtained, the courts will not entertain the appeal." *Judgment, Court of Appeals.* (See Record, Pages 23 through 25, Appendix, Page A-4).

An application for rehearing in the Court of Appeals was applied for and denied. (Record, Pages 26 through 32). A petition for a Writ of Certiorari or Writ of Review to the Court of Appeals, Second Circuit, was applied for and refused in the Louisiana Supreme Court. (Record, pages 39 through 121). From that judgment, this petition is made.

REASONS FOR GRANTING THE WRIT

In this case, the legal rights of petitioner have been ignored by the State courts from the beginning. At every stage of the proceedings, from the receipt of the first notice from the City that the stream was to be paved, petitioner has cited, in the District Court, Court of Ap-

peals, and the Louisiana Supreme Court, the law he depends on for protection, and in every instance the courts have refused to apply the law. For the following reasons, petitioner feels that certiorari should be granted.

Article 661 of the Louisiana Civil Code states:

> "He whose estate borders on running water, may use it as it runs, for the purpose of watering his estate, or for other purposes.
>
> "He through whose estate water runs, whether it originates there or passes from lands above, may make use of it, while it runs over his lands; but he can not stop or give it another direction, and is bound to return it to its ordinary channel, where it leaves his estate." Article 661, *Louisiana Civil Code of 1870.*

When petitioner bought the property which abuts the stream, the presence of the stream was one of the primary considerations for the purchase. The stream afforded an opportunity to utilize running water for irrigation, as well as an opportunity for useful experimentation in hydraulics in connection with petitioner's business. One phase of petitioner's business deals with the manufacture of devices for controlling water, and a substantial part of the irrigation system placed in the stream was done to observe the behavior of water in the operation of hydraulic rams. All improvements placed on the stream were placed with the consent of the Daughters of the Cross, the record owners of the bed and opposite bank of the stream. It was never contemplated that there would ever be any necessity for removing these improve-

ments since the City disclaimed any responsibility for the upkeep of natural drainage streams throughout the city at that time, and has only recently begun its program of public interference with private property. In the case of the stream in question, the City had categorically refused for years to improve the stream, giving as their reason the fact that the stream was on private property and beyond the purvue of municipal authority. Actually, any paving or alteration in the grade of the stream was totally unnecessary since the stream had, over the years, deepened itself to the lowest point it could, and it was at that point that petitioner's pool drain was installed. (Appendix, Pages A-10, A-11, and A-12, and Exhibit B-7). The bottom elevation of this stream has not, to petitioner's certain knowledge, altered in the least since 1943.

Article 661 was cited to the District Court, the Court of Appeals, Second Circuit, and the Louisiana Supreme Court, as was R.S. 38:215. In every instance, the courts refused to rule on the applicability of these provisions.

Section 215 of Title 38 of the Louisiana Revised Statutes of 1950 states:

> "No person shall wilfully obstruct any natural or artificial drainage canal, creek, bayou, or small river, or any public or private drainage.
>
> "Whoever violates this Section shall be fined not less than twenty-five dollars nor more than one hundred dollars and in default of payment of fine and costs shall be imprisoned for not less than thirty days nor more than six months.

"Each obstruction shall constitute a separate offense.

Failure on the part of anyone who has felled or cut trees in such manner that the tops obstruct any drainage or has placed any other obstruction in any drainage to remove the obstruction shall constitute prima facie evidence of wilful intent within the meaning of this Section.

"The word drainage as used in this Section means any natural drain or any artificial drain which has been used for the purposes of drainage for at least ten years." R.S. 38:215, *Louisiana Revised Statutes of 1950.*

In erecting the improvements and irrigation system aforementioned, several drains were tied into the walls of the stream through the rock wall built by petitioner. (Exhibits A and B-7). The most important of these was the swimming pool drain, (Exhibit B-7), an eight-inch drain which extended from the center of the bottom of the pool into the stream at its ordinary low-water level. R. S. 38:215 makes it a criminal offense for anyone to obstruct artificial drainage in use for more than ten years. All of petitioner's drains were tied into the stream more than ten years prior to December 7, 1955. The City was fully advised of this fact before the contract for construction on said stream was ever let for bids. In putting through the plan which destroyed petitioner's irrigation and drainage systems, and destroying the usefulness of petitioner's swimming pool, the City deliberately ignored a code article (Appendix, Pages 7 and 8) and statute (Appendix, Page A-8) with which they were completely famil-

iar. This amounted to winking at the law and illegally and unnecessarily destroying the property of a private citizen to accomodate its own engineers.

In the first place, there was no reason to pave the stream. (Appendix, Pages A-10, A-11, and A-12). There was no flooding problem, and the stream had found its own natural level years before. In the second place, the stream could have been paved at its existing grade and adequate drainage would have been secured, (Appendix, Pages A-10, A-11, and A-12), which is the only province of the City. If the City wished to raise the grade merely to mollify its engineers, the same grade could have been secured by lowering a street crossing about 1,000 feet below petitioner's property, (Exhibits C-1 and C-2), and no damage would have resulted to petitioner. The City gave excessive cost as the reason for refusing to lower the street crossing, apparently preferring to damage an individual in an amount substantially in excess of what it would have cost to lower the street crossing.

By legal delays and constant dilatory tactics, the City managed to prevent a hearing of this action on its merits. The courts refused injunction, even though the unambiguous language of the Louisiana Code of Practice makes it mandatory for a district judge to render such relief. Louisiana Code of Practice Articles 296 and 298 state:

> "296. Injunction, or prohibition, is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which he contends may be in-

jurious to him or impair a right which he claims. *Article 296, Louisiana Code of Practice.*

"298. The injunction must be granted, and directed against the defendant himself, in the following cases:

(5) When the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year, either of a real estate or of a real right, of which he claims either the ownership, the possession or the enjoyment." *Article 298, Louisiana Code of Practice.*

Obviously, this language removes any right of discretion in granting injunctions from the courts. The language clearly indicates that it is mandatory for the the district judge to grant injunctions to plaintiffs in plights similar to that of the petitioner. If spite of the language of the Louisiana Code of Practice, the District Court refused to enjoin the City. The damage could have been avoided and the case tried on its merits several times by issuance of a preliminary injunction, and allowing petitioner to present and have his case heard.

The City contends that since the damage is done, petitioner has no further right to have the damage repaired and no right to his drainage and irrigation. Such an allegation is ridiculous. So long as the courts allow the City to maintain the cemented ditch in its present condition, the damage continues. The irrigation system has been destroyed and the swimming pool drain covered by slab concrete, but the damage can be rectified. Since

the City showed no consideration when they destroyed improvements erected by petitioner at substantial expense, no expense should be spared in returning the premises to the status quo. Anything other than complete restitution of the irrigation facilities and drainage facilities would be unsatisfactory, especially in view of the fact that the City, through its engineering department, has exhibited an uncompromising, malicious and vindicative attitude towards petitioner since he refuses to agree with the City's destructive methods of drainage engineering. A good example of the kind of small mind which is responsible for the plan which damaged petitioner may be illustrated by the fact that during the paving of the stream, the paving contractor was nice enough to lay eight-inch paving tile on an angle from the swimming pool drain into the middle of the stream so that the pool could be emptied to within two or three feet of the bottom by gravity. When the City's drainage engineer learned of this, he ordered the drain sealed off so that it could not be used and had it finished with cement so it is now impossible to locate where it was. This childish act is a perfect example of the good faith shown by the City throughout the discussion of compromise and the prosecution of this action in the State Courts.

The constant refusal of the State courts in Louisiana to abide by the unambiguous letter of the law allows a flagrant taking without due process or equal protection of the law of the property of one of its citizens. Section 1 of the Fourteenth Amendment to the U.S. Constitution states that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty *or property*, without due process of law; nor deny to any person within its jurisdiction the *equal protection* of the law." *Amendment 14, § 1, U. S. Constitution,* (Emphasis ours).

That a municipality is a political subdivision of the State is a question too well settled at law to argue here.

> "A municipality being a creature of the State, the provision of the U. S. Constitution that no State shall deprive any person of life, liberty, or property without due process of law is applicable to its ordinances." *Connor v. City of Birmingham,* 60 So. 2d 474, certiorari denied, 60 So. 2d 479, (1952).

That petitioner was deprived of due process and equal protection of the law is obvious.

> "The test as to whether requirements of due process of law have been met is simply whether the law operates equally upon all who come within the class to be affected, embracing all persons who are or who may be in like situations or circumstances." *State v. Erickson,* 255 Iowa 1261, 282 N. W. 728, (1938).

In this case, the courts have uniformly avoided applying the law to a municipality allegedly acting in the public interest. The very laws which were written to prevent just such a situation as the one in this case have been categorically ignored by the Louisiana courts. It

is just such an instance as this which was contemplated in the framing of the Fourteenth Amendment.

> "'Deprivation of property' does not require actual physical taking, but occurs when free use and enjoyment or power of disposition is affected." *McInnis v. McKay*, 127 Me. 110, 141 A. 699, (1928), affirmed 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975, (1929).

In this case, petitioner has always been within his rights. He erected improvements, an irrigation system and drainage facilities with permission and to protect his property. The right to irrigation is given by Article 661 of the Louisiana Civil Code of 1870, (Appendix, Pages A-7 and A-8), and the right to drainage by § 215 of Title 38 of the Louisiana Revised Statutes of 1950. (Appendix, Page A-8), The drains have been in existence in excess of ten years, as have the other improvements. The only means available to petitioner to protect himself from the confiscatory tactics of the City was injunction. It was mandatory on the courts to grant injunction and by refusing to grant it, the courts condoned the damage done petitioner. There is no question under the law as to whether or not the rights guaranteed under the aforementioned code article and statute should be protected. Historically, such rights have been protected.

> "Within this clause, 'property' is more than the mere thing which a person owns, and includes the right to acquire, use, and dispose of it and these essential attributes of property are protected by the Constitution." (*Buchanon v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, (1917).

"The term 'property' as used in the guaranties against the taking of property without due process of law embraces everything over which a man may have exclusive control or dominion, and includes not only title and possession, but also the rights of acquisition and control and the right to make any legitimate use or disposal of the thing owned - - - ." *Rasner v. Federal Collateral Society*, 300 N. W. 45, (1941).

"The right to devote land to any legitimate use is 'property' within this clause." *State of Washington ex rel. Title Trust Company v. Roberge*, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210, (1928).

The City in this case has damaged petitioner in its effort to secure so-called adequate drainage. In so doing, they have exceeded their authority to improve drainage. Drainage was adequate before interference by the City, (Appendix, Pages A-10, A-11, and A-12), and the damage was done on a stream lying on private property with public funds obtained from two municipal bond issues. This amounts to an expenditure of public funds to damage private property without permission. The only function of the City insofar as drainage is concerned is to provide adequate drainage. This does not give them the right to ignore statutory and codal law, nor to damage property of a private citizen without restitution while allegedly providing drainage that is neither necessary nor wanted. The rights of drain and the use of running water are property rights in every sense of the word, guaranteed by the Civil Code and the Revised Statutes of Louisiana. The courts have held that arbitrary discrimination against individual citizens by municipalities under the guise of

statutory authority will not be tolerated. See *Schloss Poster Advertising Company v. City of Rock Hill*, 2 S.E. 2d 392, 190 S. Ct. 92, (1939).

That the Fourteenth Amendment of the Constitution of the United States was drafted to protect the property rights of individuals from arbitrary confiscation by the states and political subdivisions thereof is undisputed. *Sorenson v. Jacobson*, 125 Mont. 148, 232 P. 2d 332, 26 A. L. R. 2d 1186, (1951); *Father Basil's Lodge v. City of Chicago*, 393 Ill. 246, 65 N. E. 2d 805, (1946).

In this case, petitioner has been deprived of due process and equal protection from the beginning. The courts have consistantly refused petitioner the protection of the very laws written to protect him. As a result, petitioner has been deprived of his property without due process or equal protection of law as guaranteed by the Fourteenth Amendment of the U. S. Constitution.

CONCLUSIONS

The rulings in the courts below show such a wanton disregard for the rights of a private citizen against the confiscatory tactics of a municipality as to deprive said citizen of due process and equal protection of the law as guaranteed by the Fourteenth Amendment of the U. S.

Constitution. This Petition for Certiorari should therefore be granted.

Respectfully submitted,

ALVA G. BLANCHARD
Petitioner
3618 Fairfield Avenue
Shreveport, Louisiana

APPENDIX

OPINIONS BELOW

ALVA G. BLANCHARD

VS

CITY OF SHREVEPORT

No. 125,849

FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

JUDGMENT

This matter came to be heard on a rule nisi for a preliminary injunction, which after hearing, the rule nisi was recalled and the preliminary injunction denied.

A rehearing was applied for, argued, submitted and overruled.

Judged read and signed at Shreveport, Louisiana, this the 24th day of August, 1956.

S/ Robt. J. O'Neal

JUDGE

A-2

NO. 8603

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

ALVA G. BLANCHARD - - - Plaintiff-Appellant

VS.

CITY OF SHREVEPORT - - - Defendant-Appellee

Appealed from the First Judicial District Court of Louisiana, in and for the Parish of Caddo.

Hon. Robert J. O'Neal, Judge

Alva G. Blanchard, In Proprio Persona

Attorney for Appellant

William L. Murdock;
James W. Hammett;
Robert E. Eatman

Attorneys for Appellee

Hon George W. Hardy, Jr.
Hon Edward L. Gladney
Hon. H. W. Ayres,

Judges

By Gladney, J.,

Alva G. Blanchard has perfected a devolutive appeal to this court from a judgment sustaining an exception of no cause and no right of action, recalling a rule nisi and denying a demand for a writ of preliminary injunction. In this court the appellee has filed a motion to dismiss the appeal on the ground that the issues presented are moot inasmuch as the work sought to be enjoined has already been completed. Accompanying and in support of the motion is evidence in the form of affidavits. No opposition has been offered to the motion.

Appellant instituted his action on April 14, 1956, and therein sought a permanent injunction to prohibit the City of Shreveport from executing certain plans to pave a ditch or stream adjoining petitioner's property. It is alleged the contemplated work would destroy improvements placed along the banks and bed of the stream by petitioner, destroy the natural beauty of the stream and thereby cause him irrevocable injury. On August 1, 1956, by supplemental and amended petition, plaintiff alleged that a contractor was at that time engaged in executing the City's plans and that a substantial part of his improvements had already been destroyed, whereupon he prayed for the issuance of a rule nisi for a writ of preliminary injunction. Prior to a hearing on the rule, which was fixed for August 14, 1956, the defendant filed an exception of res judicata and a plea of estoppel, which were overruled. The court, however, sustained an exception of no cause and/or right of action,

recalled the rule nisi and denied plaintiff's demands for a writ of preliminary injunction. From the judgment so rendered, orders of devolutive appeal were granted. The appeal was perfected and the record filed in this court on August 27, 1956.

The motion to dismiss must be sustained. Attached to the motion are affidavits of Robert L. Horton, City Engineer of the City of Shreveport, and Bobby R. Adams, Field Engineer, employed by the City of Shreveport, to the effect that the work contemplated in the City's plans for the paving of the drainage ditch adjoining plaintiff's property at 3618 Fairfield Avenue was completed on September 20, 1956. This evidence is in no wise contradicted.

We are left with no other alternative than to dismiss the appeal as there can be no doubt that the acts of defendants which plaintiff would prevent by this appeal, have been fully performed.

It is well settled that in cases where no practical results can be obtained, the courts will not entertain the appeal. See: *Dunham vs. Town of Slidell* (1913), 133 La. 212, 635; *Carey vs. Louisiana Highway Commission* (1926), 161 La. 435, 108 So. 874; *Gulf Coast Const. Co. vs. Adams* (1928), 165 La. 873, 116 So. 217; *Turner vs. City of New Orleans,* (1927), 164 La. 1013, 115 So. 128; *Pettingill vs. Hills, Inc.,* (1942), 199 La. 557, 6 So. 2d 660; *Freret Civic Association vs. Orleans Parish School Board* (1953), 223 La. 407, 65 So. 2d 893; *State ex rel Clement Betpouey, Jr. & Co. vs. Jefferson Parish Waterworks District No. Five,* (1953) 223 La. 566, 66 So.

2d 338; and *Smallen Navarre, Jr. vs. Lafayette Parish School Board and J. C. Landry,* (1955), 226 La. 876, 77 So. 2d 520.

This appeal is dismissed at appellant's cost.

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SUPREME COURT OF LOUISIANA

New Orleans

BY FOURNET, C. J.:

January 21, 1957

ALVA G. BLANCHARD

vs.

CITY OF SHREVEPORT

No. 43,311

In re: Alva G. Blanchard Applying for Certiorai or Writ of Review to the Court of Appeal, Second Circuit, Parish of Caddo.

Writ refused. The judgment complained of is correct.

/s/ JBF

/s/ ALP

/s/ JBH

/s/ FWH

/s/ EHMcC

/s/ JDS

- - - - - -

STATUTES AND REGULATIONS

Article 296, Louisiana Code of Practice

296. Definition.—

Injunction, or prohibition, is a mandate obtained from a court, by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims.

Article 298, (5), Louisiana Code of Practice

298. Cases in which directed against defendant.—

The injunction must be granted, and directed against the defendant himself, in the following cases:

5. When the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year, either of a real estate or of a real right, of which he claims either the ownership, the possession or the enjoyment.

Article 661, Louisiana Civil Code of 1870

Art. 661.—

He whose estate borders on running water, may use it as it runs, for the purpose of watering his estate, or for other purposes.

He through whose estate water runs, whether it originates there or passes from lands above, may make

use of it, while it runs over his lands; but he can not stop or give it another direction, and is bound to return it to it ordinary channel, where it leaves his estate.

R. S. 38:215, Louisiana Revised Statutes of 1950

§ 215. Obstruction of drainage prohibited.—

No person shall wilfully obstruct any natural or artificial drainage canal, creek, bayou, or small river, or any public or private drainage.

Whoever violates this Section shall be fined not less than twenty-five dollars nor more than one hundred dollars and in default of payment of fine and costs shall be imprisoned for not less than thirty days nor more than six months.

Each obstruction shall constitute a separate offense.

Failure on the part of anyone who has felled or cut trees in such manner that the tops obstruct any drainage or has placed any other obstruction in any drainage to remove the obstruction shall constitute prima facie evidence of wilful intent within the meaning of this Section.

The word drainage as used in this Section means any natural drain or any artificial drain which has been used for the purposes of drainage for at least ten years.

28 U. S. C. A. § 1257 (3)

§ 1257. State courts; appeal; certiorari.—

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Amendment 14, § 1, United States Constitution

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE GEO E. DUTTON ENGINEERS

GIDDENS-LANE BUILDING
SHREVEPORT, LOUISIANA

Member
American Society
of
Civil Engineers

June 14, 1956

Mr. Alva Blanchard
Shreveport, Louisiana

Re: *Blanchard vs. Shreveport St. Vincent Ditch*

Dear Mr. Blanchard:

In approaching this problem an observation is necessary. This is a hill creek from source to outlet, having a drop or fall in its present bottom of 17.3 feet in traveling 3000 feet from St. Vincent to Smitherman ditch at Fairfield. This means a grade of 0.5-%, (two and one-half times the City's requirements). The scouring effect of this grade shows in present ditch and city plans use slow down grade to offset it.

The City contends:

(1) That the flat grade asked for by you will allow silt to collect and damage drain when paved;

(2) That the flat grade will cause ditch to overflow its banks below dam;

(3) That the present rocked walls and dam will cause turbulance and harm to ditch;

(4) That the only practical grade then can be used is a 0.2-% and that any change from same will harm the drain;

(5) That in order to have an efficient ditch, the Blanchard dam and rock walls must be torn out and swimming pool and irrigation system outlet cut off, damaging you approximately $8,000.00;

I have examined City plans for this drain improvement and made my own observation of creek and your improvements, see profile of ditch and map attached for reference.

My opinion is that all four contentions are pure camouflage and have no basic grounds for the destruction of your improvements.

(I) Silt does not collect in a scouring ditch that flows 18 feet per second;

(2) The flat grade at lower end of ditch has small effect on discharge and velocity at flood stage and will not damage the efficiency of ditch. See approximate hydraulic gradient shown on profile;

(3) By actual observation at present dam at flood stage, the water surface is smooth, showing no turbulance. This shows that surface water grade is true grade to calculate discharge;

(4) This contention falls if you check profile, since the series of grade drops at upper end of ditch show a definite grade of 0.75-% at flood stage.

Finally if City could see the possibilities of incorporating your present walls and dam in their plans, your improvements would be saved ($8,000.00) and a $3,000.00 for the City as you have previously offered to bear the expense of rocking both sides and bottom past your property as shown by map attached.

Respectfully submitted,

s/ Geo E. Dutton

GEO. E. DUTTON, Engineer
Member American Society

GED:dn

FILED
MAY 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 920

ALVA G. BLANCHARD

Petitioner

vs.

CITY OF SHREVEPORT

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM L. MURDOCK
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Shreveport, Louisiana

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LECOMTE, SHREVEPORT, LOUISIANA

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IN THE

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OCTOBER TERM, 1956

No. 920

ALVA G. BLANCHARD

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CITY OF SHREVEPORT

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

This suit was filed by petitioner in the First Judicial District Court in and for Caddo Parish, Louisiana, on April 14, 1956. The petition, in brief, alleges that petitioner is the owner of certain residential property in Shreveport upon which he has constructed a swimming pool and other improvements; that these improvements were either connected with or actually located in a stream which adjoins the rear boundary of petitioner's property;

that the City of Shreveport was planning to pave this stream and was in the process of receiving bids from contractors; that such paving would destroy petitioner's improvements and do irreparable injury to petitioner; that petitioner had proprosed an alternative plan to the City which was rejected; and that the course planned by the City would violate laws of the State relative to drainage and use of running water and would be an improper exercise of the City's powers. The petition then prayed that the City of Shreveport be permanently enjoined from disturbing petitioner in the possession and enjoyment of the improvements he had placed in the stream adjoining his property and that the City be enjoined from constructing its planned facilities insofar as it would affect petitioner in the use of his improvements, or disturb the natural drain, or mar the beauty, by erecting any slab concrete masonry work on or about the stream.

On May 22, 1956, petitioner filed a supplemental and amending petition praying for court costs and attorney's fees.

On August 1, 1956, petitioner filed a second supplemental and amending petition whereby he alleged that a contractor was currently paving the stream in accordance with the City's plans and that a substantial part of his improvements had been destroyed. He prayed that the City be ordered to show cause why a preliminary injunction should not be issued to the same effect as the permanent injunction previously prayed for. The rule was made returnable August 14. The contractor doing

the work under contract with the City was not made a party to the suit.

On August 14, the City filed an Exception of Res Judicata, a Plea of Estoppel, an Exception of No Cause or Right of Action and an Answer to the Rule for a Preliminary Injunction.

On August 24, 1956, a judgment was read and signed showing that after hearing, the rule nisi was recalled and the preliminary injunction denied, and that a rehearing was applied for, argued, submitted and overruled.

Petitioner duly perfected an appeal from the judgment denying a preliminary injunction to the Court of Appeal, Second Circuit, State of Louisiana. On September 20, 1956, the City filed in the Court of Appeal a Motion to Dismiss Appeal on the basis that the issues had become moot, the paving work and other improvements sought to be enjoined having been completed by the contractor. Affidavits by the City Engineer and a field engineer employed by the City were attached to the motion in support thereof.

On October 25, the Court of Appeal in a written decision sustained the City's motion and dismissed the appeal at petitioner's cost. A rehearing was applied for and refused on November 29.

On December 27, 1956, petitioner filed in the Supreme Court of the State of Louisiana an application for writs of certiorari or review. On January 21, 1957,

the Supreme Court refused the writs, stating that the judgment complained of is correct. It is from this judgment that petitioner has applied to this Honorable Court for a writ of certiorari directed to the Louisiana Supreme Court.

This matter has never been tried on the merits and no testimony has ever been adduced. The exhibits referred to in petitioner's "Statement" (p. 4 et seq.) were never filed in evidence and most of the facts set out in his "Statement" do not appear in petitioner's pleadings.

ARGUMENT

The Supreme Court should refuse to review this case for the following reasons:

I. No federal question has ever been pleaded, argued or raised in any manner in any court below.

II. There is no federal question of substance involved in this case.

III. The judgment of the state court was based upon a non-federal ground fully adequate to support the judgment.

IV. The issues in this case have become entirely and completely moot.

I.

No Federal Question Has Ever Been Pleaded, Argued Or Raised In Any Manner In Any Court Below.

It is essential to the jurisdiction of the Supreme Court under 28 U. S. C. A. Sec. 1257 (3) that a substantial federal question be properly raised in the State court proceedings. *Rule 19, Revised Rules of Supreme Court; Michel v. State of Louisiana*, 350 U. S. 91, 76 S. Ct. 158, 100 L. Ed. 83 (1955), rehearing den. 350 U. S. 955, 76 S. Ct. 340, 100 L. Ed. 831; *Ellis v. Dixon*, 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231 (1955), rehearing den. 350 U. S. 855, 75 S. Ct. 37, 100 L. Ed. 759; *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U. S. 692, 49 S. Ct. 457, 73 L. Ed. 903 (1929); *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927); *Missouri Pac. R. Co. v. Hanna*, 266 U. S. 184, 45 S. Ct. 36, 69 L. Ed. 235 (1924). An examination of the pleadings and the record in this case discloses that at no stage of the proceedings in the state court was any federal question ever raised. The first mention of the Constitution of the United States or of due process or of equal protection appears in the petition for writ of certiorari filed in this Court.

II.

There Is No Federal Question Of Substance Involved In This Case.

Under Rule 19 of the Revised Rules of the Supreme Court of the United States and under numerous decisions of this Court, before this Court will review the decision

of a state court it must appear that a substantial federal question is involved. It must also appear that there are "special and important reasons" for the review. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190 (1902); *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

For the first time in this case, petitioner has asserted in his petition for writ of certiorari that his rights under the Fourteenth Amendment to the Constitution of the United States have been violated. An analysis of petitioner's pleadings and argument shows that from the beginning of this suit his claim for relief has been based on a contention that the manner in which the City of Shreveport proposed to carry out a drainage project was in violation of certain Louisiana statutes relative to drainage and use of running water. His present contention that his rights under the Constitution have been violated is based purely and simply upon the grounds that the action of the City violated these statutes and that the failure of the state court to so hold amounted to a deprivation of due process and equal protection of the law. Actually he is presenting no federal question at all but only a question of whether or not the state court was correct in its application of the state law.

And even if there is a federal question involved here, it is in no way substantial. The issues originally presented in this case involved primarily the application of state statutes to a particular state of facts peculiar to petitioner. The decision in this case is of no importance

whatsoever to anyone except the litigants and could not affect the public generally or any group of persons.

III.

The Judgment Of The State Court Was Based Upon A Non-Federal Ground Fully Adequate To Support The Judgment.

This court has consistently ruled that it will not review a state court judgment based upon an adequate and independent non-federal ground. *Murdock v. Memphis*, 20 Wall, 590, 636 (1875); *Herb v. Pitcairn*, 324 U. S. 117, 125, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945); *Durley v. Mayo*, 351 U. S. 277, 76 S. Ct. 806, 100 L. Ed. 771 (1956); *Love v. Griffith*, 266 U. S. 32, 45 S. Ct. 12, 69 L. Ed. 157 (1924).

In this case, the judgment of the highest state court denied writs of certiorari and review stating that "The judgment complained of is correct." The judgment complained of was a judgment of the Court of Appeal, Second Circuit, dismissing petitioner's appeal on the basis that the issues involved had become moot. No federal question having ever been presented to either the Louisiana Supreme Court or the Court of Appeal, the judgment of necessity was based on a non-federal ground entirely. The non-federal ground could either have been that the issues had become moot as decided by the Court of Appeal or that petitioner had stated no cause or right of action, as decided originally by the District Court. Either

of these grounds is entirely adequate as shown on the face of the record.

IV.

The Issues In This Case Have Become Entirely And Completely Moot.

The sole object of this action was to enjoin the City of Shreveport from carrying out a proposed drainage paving project on a draigage ditch located entirely on property owned by the Congregation of the Daughters of the Cross, which property is to the rear of petitioner's property. After the trial court had sustained the City's exception of no cause or right of action and while this case was on appeal to the Court of Appeal from that judgment, the proposed work was done and completed by the contractor. The City filed a motion to dismiss in the Court of Appeal, attaching affidavits of the City Engineer and a field engineer to the effect that the work was completed. The Court of Appeal dismissed the appeal on the ground that the matter had become moot.

The action which petitioner sought to enjoin having been completed it would be impossible for this Court to grant any effectual relief. See *Love v. Griffith*, 266 U. S. 32, 45 S. Ct. 12, 69 L. Ed. 157 (1924); *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

CONCLUSION

In conclusion, it is respectfully submitted that the petition for a writ of certiorari should be denied for the reasons set out above.

Respectfully submitted,

WILLIAM L. MURDOCK
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Counsel for Respondent

CERTIFICATE

I hereby certify that a copy of the above and foregoing brief in opposition to petition for certiorari has been served upon Alva G. Blanchard, petitioner, appearing In Propria Persona, by depositing same in a United States Post Office or mail box, with first class postage prepaid, addressed to petitioner at his post office address, 3618 Fairfield Avenue, Shreveport, Louisiana, this ..... day of May, 1957.

.....

Of Counsel.